ISSN (Online): 2395- 6593

FUNOON JOURNAL AN INTERNATIONAL JOURNAL OF MULTIDISIPLINARY RESEARCH

Cyber Space – Jurisdiction Issues: National and International Perspective

Gulafroz Khan

PhD Scholar, Department of Law,

University of Kashmir, Srinagar, Kashmir

Email: gulafroz111@gmail.com

&

Mushtaq Ahmad Dar

Associate Professor, Law, DDE,

University of Kashmir, Srinagar, Kashmir

Abstract: *One of the advantages of the internet over other methods of communication and commerce is that it enables access to a much wider, even a worldwide, audience. Spatial distance and national borders are irrelevant to the creation of an internet business, many of which are conceived for the express purpose of expanding sale horizons across borders. In a sense, a person can be everywhere in the world, all at once. This ease of communication raises a vital legal question, however when a person puts a website on his home server and allows access to it from all points on the globe, does he subject himself to the governance of every law and rule maker in the world? Under the current system, in order to decide what states or national laws govern disputes that arise over internet issues, a court first must decide where internet conduct takes place, and what it means for internet activity to have an effect within a state or nation. Cyberspace, which constitutes a technology-driven imaginary space, defies control by mechanisms evolved in the real world essentially based on geopolitical boundaries. It*

ISSN (Online): 2395- 6593

is a new social order, which cuts across cultures, civilizations, religions, etc. and creates a ''new realm of human activity''. Forcing mankind to rethink the appropriateness of extending the existing rules on cyber space. Thus an attempt is made to throw light upon numerous theories, doctrine and principles developed by courts vis-a-vis international and national level.

Key Words: *Cyberspace, jurisdiction, visual world, territorial jurisdiction, Personal jurisdiction.*

Introduction: Jurisdiction is the authority of a court to hear a case and resolve a dispute involving person, property and subject matter. These principles of jurisdiction are enshrined in the constitution of a state and part of its jurisdictional sovereignty. All sovereign independent States possess jurisdiction over all persons and things within its territorial limits and all causes, civil and criminal, arising within these limits. Cyberspace clearly disregards this general principle, existing in the real world, between physical borders and ''law space''—based on considerations of power, effects, legitimacy and notice. The law, in the ''non-virtual world'', works essentially on a two-way premise that a certain set of legal rules is applicable to only one set of persons, who are present within the limits of the sovereign prescribing such rules, and to none other[1]; and that a certain set of persons are required to comply with only one set of standards, and with none other. It is this perception, which having been mutually recognized and accepted by most sovereigns gives the requisite strength and legitimacy to each sovereign to enforce its legal rules within its territory. However, the case with the cyber world is different as it admits of no territory or polity based borders sufficient to impose a certain set of rules to a certain territorially defined set of persons. This leads each cyber actor to act according to his own legal order or perhaps no legal order at all, leading to blatant violations of what may be guaranteed rights under other legal regimes. Litigation involving the internet has thus increased as the internet has developed and expanded. The ''border-breaching'' nature of cyberspace, the substantial difference in the substantive laws of different states and the absence of any enforcement mechanism in the virtual world give rise to a multiplicity of judicial forums, since the cause of action and the parties are spread across physical borders. This enables a plaintiff to choose his forum, and the defendant, in his turn, to question the jurisdiction of the chosen court. Any ruling on the question requires a balancing of the interests of the plaintiff, who has a right to choose his forum and the defendant, who cannot be exposed to the contingency of facing litigation in any and every court. The courts are accordingly struggling to come up with a

[1] Except in a case where another sovereign also prescribes the same set of rules, in which case also there is only one set of persons vis- `a-vis the set of rules in question.

ISSN (Online): 2395- 6593

coherent doctrine of personal jurisdiction for internet transactions. Far from there being unanimously agreed concrete rules, there are at least two broad and diametrically opposite ways in which different legal systems and scholars are responding to the problem. Some scholars and systems find appropriate to ''borrow . . . the principles of conflict of laws relating to personal jurisdiction and extending them to cyberspace setting''.[2]Others, realizing that the addresses of the computers on the internet are digital rarely containing geographic indications, find traditional rules of private international law grossly inadequate and often suggest exposition of new rules to address this new situation. A comparative study shows that each legal system has responded to this question differently, based upon its own ideas of justice, expediency, convenience and experience, and guided by the prevalent constitutional and political order. While some states have adhered to the requirement of territorial nexus as the basis of jurisdiction, others claim to have ''adapted'' and ''relaxed the jurisdictional basis'' to better counter the challenges posed by, and keep pace with, developments in science and technology. If the courts do not permit technology development in the court proceedings, it would be lagging behind compared to other sectors. Thus the question as to the jurisdiction of a forum court in suit involving internet related disputes are examined with reference to the development of the law in common law jurisdictions particularly the USA, UK, Canada, Australia and India.

1. Judicial Approach in USA

To order to exercise personal jurisdiction court must find sufficient nexus between the defendant or the *res*, on the one hand and the forum on the other. The law of personal jurisdiction has changed over time reflecting changes of a more mobile society. The approach to which the US courts adhered for a long time was reformulated to allow jurisdiction over nonresident individuals and entities based on the ''minimum contacts'' of the out-of-state party.[3] The two bases for a US court to exercise jurisdiction are discussed below:

1.1 Jurisdiction based on Territory

Physical presence in a state is always a basis for personal jurisdiction. The exercise of jurisdiction is permitted over people and property within the territorial borders.[4] In such a case, physical presence in a forum state is a basis for personal jurisdiction, even when an out-of-state individual enters the forum state for a brief time.[5] Physical presence in the forum state satisfies the requirement of constitutional due process.

1.2 Jurisdiction over out-of-state defendants

Where the defendant is not physically present, a US court exercises jurisdiction through the ''out-of-state statute'' route. There are two requirements subject to which a court can exercise

[2] Vakul Sharma, *Information Technology Law and Practice* ,Delhi: Universal, 2004, p.262.
[3] Brian Pearce, ''The Comity Doctrine as a barrier to Judicial Jurisdiction: A USEU Comparison'' (1994) 30(2) *Stanford Journal of International Law* 525
[4] *Pennoyer v Neff* 95 U.S. 714 (1877);
[5] *Burnham v Superior Court* 495 U.S. 604 (1990).

ISSN (Online): 2395- 6593

personal jurisdiction over an out-of-state defendant.[6] First, there must be statutory authority granting the court jurisdiction over the defendant. And, secondly, the due process clause of the Constitution must be satisfied. In a number of cases, the reach of state statutory authority has been limited because of violations of the constitutional due process. Thus, determining whether a court may exercise personal jurisdiction over a defendant requires a two-step inquiry that is physical presence of a person and out of state statute. These principles have been used by various courts to resolve e-commerce related issues.

In USA the test for determining the jurisdiction was purposeful availment. The early decision is one of the US Supreme Court in ***International Shoe Co. V. Washington***[7], where a two-part test for determining jurisdiction of the forum court over a defendant not residing or carrying on business within its jurisdiction was evolved. It was held that in such instance the plaintiff had to show that the defendant has sufficient "minimum Contract" in the forum state. In other words, the defendant must have purposefully directed its activities towards the forum state or otherwise "purposefully availed" of the privilege of conducting activities in the forum state. Further, the forum court had to be satisfied that exercising jurisdiction would comport with the traditional notion of fair play and substantial justice. This law was further developed in later cases. In ***Burger King Corp V. Rudzewicz***[8], that the appellant Burger King Corp. had its principal office in Miami. It entered into franchise agreement with the defendant who opened a restaurant pursuant there to in Michigan. The defendant defaulted in making the monthly payment. The plaintiff terminated the franchise agreement and ordered the defendant to vacate the premises. When the defendant refused, the plaintiff sued him in Miami. Florida had a long arm statute that extended jurisdiction to any person, whether or not a resident of that state, who committed a breach of a contract in the state by failing to perform acts that the contract required to be performed there. District Court held that the defendant franchisee was subject to the personal jurisdiction of the court in Miami.[9] The Court of appeals reversed and the plaintiff appealed to the Supreme Court. Reversing the Court of Appeals and restoring the judgment of the District Court, the Supreme Court held that the defendant did not have to be physically present within the jurisdiction of the forum court and that forum court may exercise jurisdiction over a non-resident "where an alleged injury arise out of or relates to actions by the defendant himself that are "purposefully directed towards residents of the forum State. It was held that "purposeful availment" would not result from "random" or "fortuitous" contracts by the defendants in the forum state requires the plaintiff to show that such contracts resulted from the "action by the defendant himself that created a substantial connection with the forum

[6] In *Hess v Pawloski* 274 U.S. 352 (1927), it was held by the US Supreme Court that jurisdiction may be exercised over any nonresident who was operating a motor vehicle within the state and was involved in an accident.
[7] 326 U.S. 340 (1945)
[8] 471 U.S.462 (1985)
[9] Ibid at p9

ISSN (Online): 2395- 6593

State". He must have engaged in "significant activities" within the forum state or have created "continuing obligation" between himself and residents of the forum state. It was held on facts that the 20 years of relationship that the defendant had with the plaintiff "reinforced his deliberate affiliation with the forum state and the reasonable foresee ability of litigation there." In ***Asahi Metal Industries V. Superior Court***[10], a Japanese company sold assemblies manufactured by it to a company in Taiwan which in turn incorporated them into the finished tyres and sold them worldwide including the US where 20 percent of its sales took place in California. A product liability suit was brought in the Superior Court in California against the Taiwanese company arising from a motorcycle accident caused as a result of a defect in the tyre. The Taiwanese company in turn filed a counter claim against the Japanese company. The order of the Superior Court declining to quash the summons issued to the Japanese company was reversed by the State Court of Appeal. However, the Supreme Court of California in an appeal by the Taiwanese company reversed and resorted the order of the Superior Court. The U.S. Supreme Court reversed the State supreme Court and held that exercise of personal jurisdiction over the Japanese company would be "unreasonable and unfair", in violation of the Due Process Clause. Further it was held that the mere placement of a product into the stream of commerce was not an act purposefully directed towards the Forum State and would not result in a substantial connection between the defendant and the forum state necessary for a finding of minimum contract.

As regards cases involving torts committed in relation to the internet, the early decision on the point handed down by the District Court in the U.S.A. appeared to permit a forum state to exercise jurisdiction even where the website was a passive one. In ***Inset Systems Inc. V. Instruction Set Inc***.[11], defendant had displayed on its website used for advertising its goods and service, a toll-free telephone number "1-800-US-INSET." The plaintiff, a company in S Connecticut brought an infringement action against the defendant in a court in Connecticut, which in any event had a long arm statute. The district court held that the defendant had "purposefully availed itself of doing business in Connecticut because it directed its advertising activities via the internet sites and toll-free number towards the State of Connecticut and all states. Internet sites and toll-free numbers are designed to communicate with people and their businesses in every state; an internet advertisement could reach as many as 10,000 internet users within Connecticut alone, and once posted on the internet, an advertisement is continuously available to any Internet user". However, the approach in ***Bensusan Restaurant Corp. V. King,***[12] was different although New York too had a long arm statute. The defendant there has a small jazz club known as "The Blue Note" in Columbia, Missouri and created a

[10] 480 U.S.102 (1987)
[11] 937F.Supp. 161 (D. Conn. 1996)
[12] 937. Supp.295 (S.N.Y.1996)

ISSN (Online): 2395- 6593

general access web-page giving information about the said club as well as a calendar of events and ticketing information. In order to buy tickets, web browsers had to use the name and addresses of ticket outlets in Columbia. Bensusan (plaintiff therein) was a New York corporation that owned " The Blue Note," a popular jazz club in the heart of Greenwich Village in the new York. It owned the right to the "The Blue Note" mark. It accordingly sued the Defendant for trademark infringement in New York. It was noticed that New York had a long arm statute. The New York court held that the defendant had not done anything to purposefully avail himself of the benefits of New York. Like numerous others, the defendant had "simply created a web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide or even worldwide but, without more, it is not an act purposefully directed towards the forum state." In Ballard V. Savage[13] , it was explained that the expression "purposefully availed" meant that the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents". It was further explained that it was not required that a defendant be physically present within, or have physical contacts with, the forum, provided that his effort are purposefully directed towards forum residents. In ***CompuServe, Inc. V. Patterson,***[14]it was found that the defendant had chosen to transmit its products from Texas to CompuServe's system and that system provided access to his software to other to whom he advertised and sold his product. It was held that Patterson has "purposefully availed himself of privilege of doing business." In ***Martiz, Inc. V. Cyber Gold, Inc***.[15],where the browsers who came on to its website were encouraged by the defendant CyberGold to add their address to a mailing list that basically subscribe the user to the service, it was held that the defendant had obtained the website "for the purpose of and in anticipation that, internet users, searching the internet for websites, will access CyberGold's website and eventually sign up on Cyber Gold's mailing list." Therefore, although cyberGold claimed that its website was a passive one, it was held that through its website, CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally. In ***Neogen Corp V. Neo Gen Screening, Inc***.,[16]the court of appeals held that purposeful availment requirement is satisfied "if the web site is interactive to a degree that reveals specifically intended interaction with residents of the state". In that case, the plaintiff (Neogen), a Michigan Corporation, was in the business of developing and marketing a range of health care, food and animal-related products and services, including certain diagnostic test kits. A suit was filed in the Michigan District Court alleging, inter alia, trademark infringement against the defendant (Neo Gen Sereening), a Pennsylvania Corporation performing diagnostic testing of blood samples from new born infants. The district

[13] 65 F.3d 1495 (1995)
[14] 89 F.3d 1257(6th Cir. 1996)
[15] 947 F. Supp. 1328 (E.D.Mo.)(1996)
[16] 282 F.3d 883, 890 (6th Cir.2002)

ISSN (Online): 2395- 6593

Court dismissed the suit for lack of personal jurisdiction. The Court of Appeals, held that the maintenance of the defendant's website, in and of itself, does not constitute purposeful availment of the privilege of acting in Michigan. It observed that the level of contract with the state occurs simply from the fact of a website's availability on the internet is therefore an attenuated contact that fall short of purposeful availment. However, the court in that case did not decide the question that whether the defendant's website alone would be sufficient to sustain personal jurisdiction in the forum State as it held that "website must be considered alongside Neo Gen Screening's other interactions with Michigan residents. Most significantly, when potential customers from Michigan have contracted Neo Gen Screening to purchase its service, Neo Gen Screening has welcomed their individual business on a regular basis. The Court further observed that although customers from Michigan contracted Neo Gen Screening and not the other way around, Neo Gen Screening could not mail test results to and accept payment from customers with Michigan addresses without intentionally choosing to conduct business in Michigan. It was in this context that the court of Appeals reversed the findings of the District Court and remanded the matter.

The Sliding Scale test for determining the level of interactivity of the website, for the purpose of ascertaining jurisdiction of the Forum state was laid down in ***Zippo mfg. Co. V. Zippo Dot Com, Inc.***[17], the plaintiff Zippo Manufacturing was a Pennsylvania corporation making cigarette lighters. The defendants was a California corporation operating an internet website and internet news service. It had its offices only in California. Viewers who were resident of other states had to go on the website to subscribe for the defendant's news service by filling out an online application. Payment was made by credit card over the internet or telephone. Around 3,000 of the defendant's subscribers were resident of Pennsylvania who had contracted to receive the defendant's service by visiting its website and filling out the online application. Additionally the defendant entered into agreements with seven internet access providers in Pennsylvania to permit their subscribers to access the defendant's news service. The defendant was sued in a Pennsylvania court for trademark dilution, infringement and false designation. After discussing the development of the law till then, the District Court first observed: "The constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or specific jurisdiction over a non – resident. General jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non – forum related activities when the defendant has engaged in systematic and continuous activities in the form state. In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the relationship between the defendant and the forum fall within the minimum

[17] 953 F.Supp.1119(W.D.Pa.1997)

ISSN (Online): 2395- 6593

contract framework as laid down in ***International Shoe Co. V. Washington***.[18]The Zippo Court then noted that a three pronged test has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant is appropriate: first the defendant must have sufficient minimum contracts with the forum state second the claim asserted against the defendant must arise out of those contract, and third the exercise of jurisdiction must be reasonable. The Court of Zippo classified websites as (I) Passive. (ii) Interactive and (iii) Integral to the defendant's business. On facts it was found that the defendant's website was an interactive one. Accordingly it was held that the court had jurisdiction to try the suit. The Zippo court's observation that the likelihood that personal jurisdiction can be constitutionally exercise is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet has been compared by that court to a sliding scale.[19]

There have been difficulties experienced in the application of the Zippo sliding scale test in terms of which the assertion of a court's jurisdiction depended upon the level of interactivity and commercial nature of the exchange of information as a result of the use of the website. The courts have been finding it problematic in determining the degree of interactivity that should suffice foe jurisdiction to be attracted. Mere ability to exchange files with the user through the internet has been held not to be sufficient interactive for the forum court to assume jurisdiction was held in ***Desktop Technologies V. Colour works Reproduction and Designs Inc***.,[20] In Mink V. AAAA Development[21] ,although the defendant's website offered printable mail-in order forms that could be downloaded, provided a toll-free number, a mailing and e-mail address, the forum court declined to exercise jurisdiction since in fact no order were placed using the website. The levels of interactivity now demanded are of much higher order. Since over the years, most websites are interactive to some degree, there has been shift from examining whether the website is per se passive or active to examining the nature of the activity performed using the interactive website. Thus it has paved way for the application of the Effect test[22]. The effect test takes into consideration the effect that "out-of-state" conduct has in the forum state. Thus, in order to have personal jurisdiction, there must be: (1) intentional action (2) expressly aimed at forum state (3) causing harm, the brunt of which the defendant knows is suffered or likely to be suffered in the forum state[23]. The court have moved from subjective territoriality test to an objective territoriality or effect test in ***Louis Feraud Int'L SARL V. Viewfinder Inc.,***[24]in which the forum court will exercise jurisdiction if it is shown that effect of the defendant's website are felt in the forum state. In other words it must have resulted in

[18] 326 US310
[19] Ibid at p 17
[20] 1999 WL98572 (E.D.Pa.1999)
[21] 190 F.3d 333(5th Cir.1999)
[22] The effect test was first evolved in Calder V. Jones, 465 U.S.783(1984)
[23] Vakul Sharma, Information Technology, Law and Practice, ed 2, universal law publishing Co.Pvt.Ltd, 2007 p 270
[24] 406 F Supp 2d 274(SDNY 2005)

ISSN (Online): 2395- 6593

some harm or injury to the plaintiff within the territory of the forum state. Since some effect of a website is bound to be felt in several jurisdictions given the nature of the internet, court have adopted a tighter version of the effect test, which is intentional targeting.

To summarize the position in the US, in order to establish the jurisdiction of the forum court, even when a long arm statute exists, the plaintiff would have to show that the defendant "purposefully availed" of jurisdiction of the forum state by "specifically targeting" customers within the forum state. A mere hosting of an interactive web-page without any commercial activity being shown as having been conducted within the forum state, would not enable the forum court to assume jurisdiction. Even if one were to apply the effect test, it would have to be shown that the defendant specifically directed its activities towards the forum state and intended to produce the injurious effect on the plaintiff within the forum state.

2. Judicial Approach in Canada

Canadian Supreme Court in case of ***Morguard Investment Ltd. V.De Savoye***,[25]emphasized the "real and substantial connection" as a test for determining jurisdiction. It was observed as follows: "it seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties".

In ***Pro-C Ltd. V. Computer City Inc***.[26], it was held that listing of Canadian retail outlets on the defendants website coupled with there being a de facto "common market" between Canada and the US meant that Canadian consumers were being targeted and therefore the Ontario court in Canada would have jurisdiction to try the trademark infringement action against the defendant located in the U.S.A. in an another case ***Patrick Desjean V. Intermix Media Inc***.,[27]the defendant, a Delaware Corporation with its principal office in Los Angeles used to offer ostensible free software programs. When the plaintiff, a resident of Canada, installed a free Intermix Screensaver or game from www.mycoolscreamocom, he also unwittingly installed one or more spyware programs. Thereafter the plaintiff brought an action against the defendant in Canada for violating the misleading representations provisions of the Competition Act, 1985 of Canada. The federal court of Ottawa, after referring to the decision of the Ontario court of Appeal in ***Muscutt V. Courcelles***[28],took the following eight factors into account while determining whether it had jurisdiction: (1) The connection between the forum and the plaintiff claim; (2) The connection between the forum and the defendant; (3) Unfairness to the defendants in assuming jurisdiction; (4) Unfairness to the plaintiff is not assuming jurisdiction;

[25] [1990] 3 SCR 1077
[26] (2000)OJ No. 2823 (Ont. Sup.Ct.), 7 CPR (4^{th})193
[27] 2006 FC 1395
[28] (2002)213 DLR(4^{th})577

ISSN (Online): 2395- 6593

(5) Involvement of other parties to the suit; (6) The courts willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; (7) Whether the case is interprovincial or international in nature; (8) Comity and standard of jurisdiction, recognition and enforcement prevailing elsewhere. The court observed that the defendant had no office in Canada although in the past it subsidized office space foe contractors working on two websites purchased by intermix. Intermix has no service in Canada www.mycoolscreen.com also was not hosted on servers located in Canada but on a server in California. It was also observed that 60% of downloads from either the defendants websites or third parties distributing the defendants applications were made by American users and the remaining were made throughout the world. Canada accounted for only 2.5% to 5% of downloads. On the basis of these facts, the Federal Court held that Canadian courts had no jurisdiction over the defendant since there was no substantial connection between the defendant and the forum.

3. Judicial approach in England and Europe

In England, there are two quite different sets of rules as to jurisdiction of the English courts. In many cases, jurisdiction is still governed by what may be called the 'traditional rules', though in a growing proportion of cases, they are replaced by the 'Convention rules'.[29] The rules of international jurisdiction of the EC Member States are now governed by a Community instrument, Regulation 44/2001. This substitutes the Brussels Convention, which after March 1, 2002 ceases to operate between the Parties to that Convention, except in their relations to Denmark. [30] The Regulation is binding in its entirety and directly applicable to the Member States.[31] The Regulation is binding on and applicable to the United Kingdom also as a result of the exercise by the United Kingdom of the ''opt-in'' option. Since there remains no difference between the UK law and that of the other Member States, in the second half of this section, a survey of the jurisdiction rules in the European Union States will be done after a survey of the traditional jurisdiction rules in the United Kingdom.

3.1 The traditional rules

The traditional rules permit an English court to exercise jurisdiction when (1) the defendant is present within England and the writ is served upon him; (2) he submits to the jurisdiction of the court [32]; or (3) he is served, at the discretion of the court,[33] with the writ, in accordance with the Rules of the Supreme Court[34] outside England. This was a shift from the earlier position where English courts founded jurisdiction based on the location of the assets or nationality or

[29] David McClean (ed.), *Morris: The Conflict of Laws*, 4th edn (Universal Publishing Co, 2004), p.60.

[30] Regulation 44/2001 Art.1(3) and Art.68(1).

[31] Regulation 44/2001 Art.76 read with Art.249 of the EC Treaty.

[32] *Deverall v Grant Advertising, Inc* [1955] Ch. 111.

[33] *Johnson v Taylor Bros* [1920] A.C. 144;

[34] Rules of the Supreme Court, Ord.11, r.1(1), replacing ss.18 and 19 of the Common Law Procedure Act 1852.

ISSN (Online): 2395- 6593

presence of the defendant.[35] In other words, if the defendant is informed or is put on notice of an action, an English court would exercise jurisdiction over him. Mere physical presence of a person, for howsoever short a period,[36] within the territorial limits of England makes him liable to the service of the writ, and consequently, makes him amendable to jurisdiction. In certain cases, the court may also permit substituted service.[37]

3.1.1 The Brussels (I) Regulation

The traditional rules on jurisdiction in the United Kingdom and in Europe underwent a substantial modification with the coming into force of the EC Treaty and the respective accession by the states thereto. This happened on account of two specific treaty provisions contained in the EC Treaty: first, Art.249 of the EC Treaty which provides for taking of measures including adoption of directives and regulations in matters over which the Community has competence; and secondly, amendment of the EC Treaty by the Amsterdam Treaty, as a result of which matters concerning ''cooperation in civil jurisdiction'' stood transferred from the third to the first pillar.[38] Articles 65 and 293 of the EC Treaty underwent amendment and the competence was therefore divided between the Community and the Member States. This gave the EC competence to take measures in accordance with Art. 249. The Council of European Union, thus complying with Arts 61(c) and 67(1) of the EC Treaty and considering the Commission's proposal and the opinions of the Parliament and the ESC, adopted EC Council Regulation 44/2001 on December 22, 2000. The Regulation entered into force on March 1, 2002 in accordance with Art.76 of the Regulation. The Regulation aims at providing highly predictable and well-defined rules[39] on jurisdiction in order to maintain an area of freedom, security and justice[40] ensuring free movements of persons,[41] sound operation of the internal market[42] and sound administration of justice.[43] The Regulation therefore applies in ''civil and commercial matters whatever the nature of the court or tribunal''.[44] The general rule is the rule of jurisdiction based on domicile of the defendant, i.e. ''persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of *that* Member State''.[45] The ''domicile-jurisdiction'' rule is not, however, an absolute one and admits of a number of exceptions provided for under Arts 3 to 7. The Regulation, taking particular care of situations where the parties' bargaining power can be assumed to be unequal, provides for much flexible bases of

---

[35] Art.23 of the German Code of Civil Procedure and Art.14 of the French Civil Procedure Code

[36] *Maharanee of Baroda v Wildenstein* [1972] 2 Q.B. 283, where during a temporary visit, a writ was served upon the defendant, who was a French resident, in respect of contract, concluded in and is governed by the law of France, in an action brought by the plaintiff who was also a resident of France. The court held that ithad jurisdiction, since that writ was served

[37] *Field v Bennett* [1886] 3 T.L.R. 239.

[38] Alex Mills, ''The Private History of International Law'' *International and Comparative Law Quarterly* 1 (2005) 55.

[39] Regulation 44/2001 Preamble Recital 11.

[40] Regulation 44/2001 Preamble Recital 1

[41] Regulation 44/2001 Preamble Recital 1.

[42] Regulation 44/2001 Preamble Recital 2

[43] Regulation 44/2001 Preamble Recital 12.

[44] Regulation 44/2001 Art.1(1).

[45] Regulation 44/2001 Art.2(1).

ISSN (Online): 2395- 6593

jurisdiction in favour of the weaker party.[46] Of these, the rules governing consumer contracts are of interest to our discussion here. Section 4 of C.II of the Regulation provides for special jurisdiction rules in respect of consumer contracts. To provide a strong protection regime to the consumers, the Regulation permits a consumer to sue in a Member State based on there being a branch, agency or other establishment in a Member State even where the actual party to the contract is not domiciled there.[47] A consumer may also sue in the Member State of his domicile.[48] A protection against any contradictory operation of the principle of party autonomy is also excluded except where the provisions are sought to be derogated from by an ex post facto agreement or in case of ex ante agreement on choice of courts, only where both the parties are habitually resident in the same Member state.[49]Besides this broad category of rules creating favorable rules for weaker parties, another set of rules are particularly relevant to the discussion. These are contained in Art.5, which provides for additional ''special jurisdiction'' rules in cases inter alia of contracts and torts. Place of performance of the ''obligation in question'', determined as the place of delivery of goods or rendering of services,[50] furnishes a basis for jurisdiction in cases of contracts.[51]96 For all delictual or quasi-delictual claims, the courts at the place of occurrence of the harmful event have jurisdiction.[52]

The jurisdiction rule under Art.5 (3) gives effect also to the principle of ubiquity and therefore includes the place of the event giving rise to the harm apart from the place where the damage actually occurred.[53] However, to the defamation claims, this rule applies with the following clarification: the place of event giving rise to the harm is the place of issuance and putting into circulation of libellous material, i.e. the place where the publisher is established.[54] Where a contract contains a choice of court clause, the normal rule, based on the recognition of the principle of party autonomy, is in favor of enforcement of such a clause.[55] While the Regulation provides that where the chosen court is a ''court of a Member State'' such court ''shall have jurisdiction'',[56] there is however no provision by which any other court is prohibited from assuming jurisdiction on any basis provided for elsewhere in the Regulation. In other words, there is a positive basis but no corresponding negative mandate. What, however, there is in the Regulation, is a provision barring jurisdiction of ''any court other than the court first seized'' of the proceedings, i.e. a *lis pendens* provision. The existence, on the statute book, of these two provisions therefore leads to the question whether the rule of *lis pendens* applies also to a case

[46] Regulation 44/2001 c.II ss.3 (Insurance Contracts), 4 (Consumer Contracts) and 5 (Employment Contracts).

[47] Regulation 44/2001 Art.15(2).

[48] Regulation 44/2001 Art.16(1).

[49] Regulation 44/2001 Art.17.

[50] Regulation 44/2001 Art.5(1)(b).

[51] Regulation 44/2001 Art.5(1)(a).

[52] Regulation 44/2001 Art.5(3

[53] *Bier v Mines de Potasse d'Alsace* [1976] E.C.R. 1735.

[54] *Shervill v Press Alliance* [1995] E.C.R 495.

[55] Regulation 44/2001 Art.23, under the section entitled ''Prorogation of Jurisdiction''. In this regard, it must be distinguished from a more widely used phraseology ''[e]xclusive [j]urisdiction'', which expression is used by the Regulation in the sense of non derogable exclusive jurisdiction, of certain courts to try specific matters, as conferred and arising out of the Regulation itself.

[56] Regulation 44/2001 Art.23.

ISSN (Online): 2395- 6593

where the parties have made a choice of court. Contrary to what was logical and perhaps obvious for some like the United Kingdom, the European Court of Justice, maintaining its position of the mandatory nature of Art.2,[57]gave precedence to the rule of *lis pendens* over the rule endorsing enforcement of choice of court agreements.[58] That Art.2 of the Regulation is mandatory and that the jurisdiction, once assumed on a basis provided in the Regulation, cannot be declined by resorting to the municipal law gives rise to an acute difficulty in a situation where the chosen court is one not in any of the Member States[59] since this runs the risk of irreconcilable judgments, at least at the international, if not the European Union level. Personal jurisdiction in cyberspace In England, cases raising the issue of jurisdiction in cyberspace have been limited in number and confined particularly to matters of defamation and cyber crimes.[60] There will be no great difficulty in finding a basis for the assertion of jurisdiction by the English courts in most cases involving defamation via the internet. The publication of the defamatory material within the jurisdiction of a court is a basis for the exercise of jurisdiction under the traditional rules, the Conventions and the Regulation since this constitutes the place where the harmful event occurred.[61]The place of publication is at the very heart of the cause of action for defamation. The fact of publication in the jurisdiction of court is therefore highly relevant.[62] Since for the purpose of the defamation law, material is published at the place(s) where it is read, heard or seen, rather than the place from which it originates,[63]a separate publication occurs, or and a separate cause of action accrues each time the material is read, heard or seen. This furnishes the basis for jurisdiction to virtually all places in the world because of the publication to a global audience.[64]An English court in such a case would therefore be tempted to consider the plea of *forum non conveniens*. The differences in the possibility of the publishers to limit the circulation of materials published mark the difference between internet publications and the more traditional publication such as newspapers and magazines. There is therefore force in the argument in cases involving internet publications that a rule like the English doctrine of *forum non conveniens* should be more readily exercised. With regard to the contracts entered into through cyberspace, there is little reason to assume that a different and rather flexible treatment would be accorded to such contracts. Any argument in favour of a treatment any more favourable than that accorded to a non-electronically concluded contract is expected to be dismissed by the ECJ considering the present mood, trend and objective of ECJ, which seems to be ‘‘one Europe’’. In such a case,

[57] 102 Case C-128/01 *Owusu v Jackson*, ECJ, March 1, 2005. See also Barry J. Rodger, ‘‘Forum Non Conveniens Post-Owusu’’ (2006) 2(1) *Journal of Private International Law* 71; Richard Fentiman, ‘‘Civil Jurisdiction and Third States: Owusu and After’’ (2006) 43(2) *Common Market Law Review* 705.

[58] *Erich Gasser GmbH v MISAT Srl* Case 116/02, December 9, 2003. The reasoning of the court was predominantly based on (1) the principle of mutual trust and (2) the mandatory nature of the *lis pendens* rule. The court’s reasoning also had shades of the objectives of ‘‘internal market’’ and ‘‘uniformity and harmonization’’. Based on these high-sounding slogans, the court disregarded that the long delay in the Italian court was detrimental to the plaintiff since the probability of a quick disposal in chosen court was very high.

[59] Kurt Siehr, ‘‘European Private International Law and Non-European Countries’’ in Borchers and Zekoll (eds), above fn.83, p.299.

[60] A discussion of jurisdiction in case of cyber crimes is outside the scope of the present article, and the same is not addressed or dealt with here.

[61] Under the Conventions and the Regulation, the damages are however limited to the injury within that state, unless the defendant is a domicile in that state.

[62] *Berezvosky v Michaels* [2000] 2 All E.R. 986

[63] *Shevill v Presse Alliance* [1995] 2 A.C. 18

[64] *Lee Teck Chee v Merill Lynch International Bank Ltd*, above fn.108.

ISSN (Online): 2395- 6593

expecting that the court would dilute its regime and puncture its harmonization drive merely to respond to a technological advancement seems too improbable.[65] Secondly, if in respect of e-contracts the jurisdiction regime is sought to be made less rigid, it may provide the parties to act contrary to the spirit of the Regulation even while complying with form; and all this merely be opting for cyberspace as the ''place'' of contracting.

3.1.2 Rome Convention

To resolve such cross-border consumer contractual dispute, the EU member States became signatory to the Rome Convention, 1980 it decides which country law would apply in contractual disputes. The Convention gave freedom of choice to the contracting parties, as it states that "a contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonably certainty.[66] It further states that "the mandatory rules of the consumers' country of habitual residence will always apply whatever choice of law is made."[67] In absence of choice of law "the contract is to be governed by the law of the country with which it is closely connected".[68] It is presumed that "the contract is most closely connected with the country where the party who is to affect the performance which is characteristic of the contract, has his habitual residence or its central administration."[69] A choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rule of the law of the country in which he has his habitual residence. Thus, the mandatory rule of law cannot be limited or excluded by contractual agreement. They include the right given to consumers by national legislation. Therefore, if the contract meets one of the following three tests, then the country will apply the law of the consumer's country in deciding the parties' right and obligations under the contract, regardless of any choice of law to the contrary:

I) If in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had then in that country all steps necessary on his part for the conclusion of the contract, or
II) If the other party or his agent received the consumer's order in that country, or
III) If the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3.2 Applicability of the Rome Convention in online Contracts

Both the Brussels Regulation Rome Convention highlights the consumer oriented provision stating that "the consumer may bring proceedings against the trader in the state of the consumer domicile/habitatual residence, if the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising. The question was whether these

[65] ChristopherWilliamPappas, ''Comparative US and EU Approaches to E-Commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation'' (2002) 31 *Denver Journal of International Law and Policy* 325.
[66] The Rome Convention, Article 3.1
[67] Ibid Article 5.1
[68] Ibid, Article 4.1
[69] Ibid, Article 4.2

ISSN (Online): 2395- 6593

provisions are applicable to online contracts also? And does a website promoted by a trader amount to a specific invitation?

According to Brussels Regulation Article 15 states that the consumer may sue at home if the trader pursues commercial activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State. According Rome Convention Article 5 states that the protection is granted to the consumer by the mandatory rules of the law of the country in which he has his habitual residence, if in that country that conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all steps necessary on his part for the conclusion of the contract.

Applying the conventions in an online setting would require an interpretation of the phrase "preceded by a specific invitation addressed to him or by advertising i.e. whether an Internet website constitutes advertising in the state of the consumer's domicile. The answer lies in the nature and form of specific invitation. If the website provides information in the country specific language and offers goods and service in such currency, then it may fulfill the criteria of specific invitation. In such a case a website is to be seen as the one being directed at that specific country and the consumer can bring proceeding against the trader in their specific home country. For example, a website giving information in French and quoting price in France, cannot be said to be directed towards the UK consumers

As far as the applicable law is concerned, the court within the EU apply the Rome Convention even where the applicable law is that of a third country or the parties are not resident or established in the EU.

In ***1-800 Flowers Inc. V. Phonenames***[70], the defendant was a UK based Phonebook Company and the plaintiff was engaged I the business of delivery of flowers. Customers across the world could access the plaintiff's website to place orders for flowers. There was, however, no evidence to show that UK residents had placed orders on its website. It was argued that because the website was accessible from the UK and the UK residents could place orders online, the use by the defendants of the mark 1-800 on its website amounted to use in the UK. It was held in the first appeal by the Bench that "mere fact that website could be accessed anywhere in the world did not mean, for trade mark purpose, that the law should regard them as binding used everywhere in the world". The intention of the website owner and what the reader will understand if he accesses the website was held to be relevant. The court of Appeal also rejected the argument. **Justice Buxton**, in a concurring opinion pointed out as under:

"I would wish to approach these arguments, and particularly the last of them, with caution. There is something inherently unrealistic in saying that A "use" his mark in the United Kingdom when all that he does is to place the mark on the internet, from a location outside the United Kingdom, and simply wait in the hope that someone from the United Kingdom will download it and thereby create use on the part of A. by contract, I can see that it might be more easily

[70] [2002] FSR 12 CA

ISSN (Online): 2395- 6593

arguable that if A places on the internet a mark that is confusing similar to a mark protected in another jurisdiction, he may do so at his peril that someone from that other jurisdiction may download it; though that approach conjured up in argument before us the potentially disturbing prospect that a shop in Arizona or Brazil that happens to bear the same name as a trademarked store in England or Australia will have to act with caution in answering telephone calls from those latter jurisdiction. However that may be, the very idea of "use" within a certain area would seem to require some active step in that area on the part of the user that goes beyond providing facilities that enable others to bring that mark into the area. Of course, if person in the United kingdom seek the mark on the internet I response to direct encouragement or advertisement by the owner of the mark, the position may be different; but in such case the advertisement or encouragement I itself is likely to suffice to establish the necessary use."

Judicial Approach in Australian

The Australian High Court in ***Dow Jones & Company Inc. V. Gutnick***[71], is instructive of the application of the effect test. Dow Jones & Company Inc, a corporation registered in the US has published material on the internet that was allegedly defamatory of Mr. Gutnick who sued in the Supreme Court of Victoria to recover damages to vindicate his reputation. The Victorian law was treated as a long arm rule which provided for jurisdiction based upon the mere happening of damage within a jurisdiction. The High Court held that the primary judge was correct in deciding the issue of jurisdiction in favour of the Plaintiff. Since the long arm was found to be valid and applicable, the arguments that the defendant had minimal commercial interest in the sale of its magazine in Victoria and that it had published them principally for the benefit of US readers was considered irrelevant. However, what is important to note is that the state of Victoria in the said case did have a long arm law which was held to be valid and which permitted extension of jurisdiction.

4. Judicial approach in India

The principle of *lex fori* is applicable with full force in all mattes of procedure. No rule of procedure of foreign law is recognised. It was held in **Ramanathan Chettier v Soma Sunderam Chettier**[72]**,** India accepts the well-established principle of private international law that the law of the forum in which the legal proceedings are instituted governs all matters of procedure. In India, the law of personal jurisdiction is governed by the Code of Civil Procedure 1908 (the Code). The Code does not lay any separate set of rules for jurisdiction in case of international

[71] (2002)HCA 56 (December 2002)

[72] AIR 1964 Mad. 527; see also *Nallatamlei v Ponuswami* ILR [1879] 2 Mad. 406.

ISSN (Online): 2395- 6593

private disputes.[73] It incorporates specific provisions for meeting the requirements of serving the procedure beyond territorial limits.[74] In matter of jurisdiction what is treated differently is the question of subject-matter competence and not of territorial competence, i.e. the question of territorial jurisdiction arises in the same way in an international private dispute as in a domestic dispute. The Code provides general provisions regarding jurisdiction on the basis of pecuniary limit, subject matter and territory. Sections 16 to 20 of the Code regulate the issue of territorial jurisdiction for institution of suits.

4.1 Rules as to the nature of suit

Based on the subject-matter suits are divided into three classes: (1) suits in respect of immovable property; (2) suits for torts to persons or movable property; and (3) suits of any other kind. Suits of immovable property must be filed within the local limits of whose jurisdiction the property situated.[75] The Code therefore incorporates the principle of *lex situs* and therefore the property in this section may refer to only property ''situated in India''. Suits for wrongs to persons and movable property may be instituted in the courts within whose local limits the wrong is done or the defendant resides or carries on business or personally works of gain.[76] Suits of any other kind are dealt with under S.20 of the Code which is the ''default rule'' providing for all others cases not covered by any of the foregoing rules. Under S.20, a court can exercise jurisdiction in actions involving persons where: (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for work; or (b) any of the defendants, where there are more than one, at the time of commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case with the leave of the court has been obtained or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of section wholly or partly arises.

4.2 Rules enforcing ''agreement of parties''

It is well-established law in India that where more than one court has jurisdiction in a certain matter, an agreement between the parties to confer jurisdiction only on one to the exclusion of the other(s) is valid.[77] The Indian law therefore recognises and gives effect to the principle of party autonomy. However, this extent of autonomy does not travel far enough so as to confer jurisdiction on a court which it inherently lacks.[78] Party autonomy is also subject to the maxim *ex dole malo non oritur action*.[79] Thus the position of law on the point is that first, a choice of law agreement is permissible; and secondly, the agreement operates only in respect of a court which does not otherwise inherently lack jurisdiction. In any such case, the courts also consider

[73] Section 9 and 15 of the Code of Civil Procedure 1908.

[74] Ord.V, rr.24 to 26.

[75] The Code C.P.C ss.16 and 17.

[76] 114 The Code ss.16 and 17and 19

[77] *RSDV Finance Co P Ltd* v *Shree Vallabh Glass Works Ltd* AIR 1993 SC 2094.

[78] *Nai Bahu v Lala Ramnarayan* [1978] 1 S.C.C. 58

[79] *ABC Laminart (P) Ltd v AP Agencies* AIR 1989 SC 1239

ISSN (Online): 2395- 6593

the balance of convenience and interests of justice while deciding for the forum.[80] Thus, in India, the principle is well settled that residence in the territorial limits of a court furnishes a ground for exercise of jurisdiction.[81] Similarly, conduct of business by a defendant in a forum also gives to the forum court to exercise jurisdiction, irrespective of his non-presence within the jurisdiction.[82] The Indian courts also assume adjudicative jurisdiction on the basis of the territorial nexus with the cause of action.[83] In this regard, the consistent view of the courts in India is that the courts are empowered to pass judgments even against non-resident foreigners, if the cause of action arises in whole or part within the territorial limits of the court.[84] The Code also provides for rules and procedure for international service of the processes of the court.[85] However, since the courts in India do not assume jurisdiction, unlike in England, on the basis of service of writ, these provisions are of not much consequence to issues of jurisdiction.

In context of the cyber jurisdiction section 13(3), (4) and (5) of the Information technology Act, 2000 is very relevant. Section 13(3) reads as save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be received at the place where the addressee has place of business. Section (4) reads as the provisions of subsection (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub section (3). Section 13(5) for the purpose of this section:

1. If the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;
2. If the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;
3. Usual place of residence, in relation to a body corporate, means the place where it is registered.

4.3 Personal jurisdiction in cyberspace

Only a very few cases concerning personal jurisdiction in cyberspace have been decided by the superior courts in India.[86] The approach adopted is similar to the ''minimum contacts'' approach of the United States coupled with the compliance of the proximity test of the Code.[87] Considering the present rules of international jurisdiction and the tendency of the Indian courts to ''suitably modify'', the existing domestic rules to international situations in other areas of private international law with respect to cyberspace courts in takes following things in consideration. The court take into consideration whether the contract contained a choice of court clause or not, where the contract contains a choice of court clause. In such a case, the Indian courts would normally give effect to such a clause subject only to a survey of *forum non*

[80] *Union of India v Navigation Maritime Bulgare* AIR 1973 Cal.526.

[81] *M. Mudaliar v Andappa Pillai* AIR 1955 Mad. 96.

[82] *Chunnilal Kastuschand v Dundappa Donappa* AIR 1951 Bom. 190

[83] *Gaekwar Baroda State Railway v Sheikj Habib Ullah* AIR 1934 All. 740

[84] R. Blainpain and B. Verschraegev (eds), *International Encyclopedia of Laws: Private International Law* (The Hague: Kluwer Law International, 2005), p 555

[85] Orders III, V of the First Schedule to the Code.

[86] *BulBul Roy Mishra v City PublicProsecutor*, Criminal Original Petition No.2205 of 2006, decided April 4, 2006.

[87] 126 *(India TV) Independent News Service Pvt Ltd v India Broadcast Live LLC* CS (OS) No.102/2007, decision dated July 10, 2007.

ISSN (Online): 2395- 6593

conveniens particularly when the same would result in foreclosure of its own jurisdiction and where the contract does not stipulate an agreed forum. In a case of this sort, the Indian courts may be inclined to apply the test of Section 20 CPC since none of the other provisions seem to be of much assistance. The court would make a twin inquiry: place of habitual residence of the defendant and proximity of the cause of action to the forum, where even an ''in part'' cause of action may furnish sufficient basis to exercise jurisdiction. Thus the Code provides for the tests of both objectivity and proximity to base its jurisdiction. While the legal system favours exercise of jurisdiction on the basis of proximity of cause of action, its exercise based on the residence of the defendant is also accepted for three reasons: (1) ease of enforcement; (2) compliance with *audi alteram partem*; and (3) the law of contempt of courts in India (as in most other common law countries). For the purpose of determining whether the cause of action arose in the local limits of a court, the courts generally go into the question of place of conclusion of the contract.[88] However, it seems that the place of conclusion of contract would not be of much assistance in case of an e-contract.[89] There would be an insoluble confusion between the rules governing completion of communication of offer, acceptance and revocation.[90] The rule in the *Bhagwan Dass* case[91] would neither apply nor lend much support in reaching a reasonable solution in contracts entered into through the internet. Thus the Indian position as may also be inferred from the trend of the Indian courts may be summarised as follows: an Indian court would not decline jurisdiction merely on the ground that the international contract in entered through the internet. It examines the two bases of jurisdiction: domicile of the defendant and proximity to cause of action. Even if one is found to be satisfied, the Indian court it seems would assume jurisdiction. However, it would be for the plaintiff to prima facie also convince that the courts elsewhere do not have a better basis of jurisdiction since the Indian courts in such a case may also feel tempted to analyze the issue of jurisdiction from the stand point of the doctrine of *forum non conveniens* as also anti-suit injunctions and thus decline to exercise jurisdiction even where there existed legal basis to do so.[92]The Supreme Court dealt with the jurisdiction in cyber Space in case of Oil and National Gas Commission V. Utpal Kumar Basu[93], The petitioner responded to the advertisement regarding a tender for a particular project in Gujarat, the advertisement being published in the Times of India in circulation in West Bengal. He submitted the tender by fax message from Calcutta and received reply of it in Calcutta. A writ petition was filed before the Calcutta High Court on plea of part of the cause of action having arisen in Calcutta. The court observed "merely because it read the advertisement at Calcutta and submitted the offer from Calcutta and made representations from Calcutta would not in our (court) opinion, constitute facts forming an integral part of the cause of action. So also the mere fact that it sent fax message from Calcutta and received a reply at Calcutta,

[88] *Bhagwan Dass Govardhan Dass Kedia v Purshottam Dass & Co* AIR 1966 SC 543.

[89] 128 The anarchic rule conferring jurisdiction on the court where the contract was concluded has ceased to be operative in almost all legal systems today. India, unfortunately, continues with this outdatedrule.

[90] 129 See [Indian] Contract Act 1872 s.4.

[91] 130 Above fn.127; the test laid down in this case is that in cases of means of instantaneous communication, the contract is said to be concluded at the place where the acceptance comes to the knowledge of the proposer.

[92] 131 *(India TV) Independent News Service v India Broadcast Live*,above fn.126.

[93] (1994) 4 SCC 711

ISSN (Online): 2395- 6593

would not constitute an integral part of the cause of action. The Apex Court in **Modi Entertainment Network V. W.S.G. Cricket Pvt. Ltd**[94]. held that It is a common ground that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction in *personam*. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court.

From the above discussion the following principles emerge:-

1. In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained must be borne in mind.

2. In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.

3. a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the Court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the Court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that Court cannot per se be treated as vexatious or oppressive nor can the Court be said to be forum non-conveniens.

Where the cause of action arise from contract, and the parties have not effectively selected the governing substantive law, the relevant criteria in a choice of law analysis are:

1. The place of contracting
2. The place of negotiation of the contract
3. The place of performance
4. The location of the subject matter of the contract
5. The location of the parties.

4.4 Decisions of Indian Courts regarding jurisdiction

In ***Casio India Co. Ltd V. Ashita Systems Pvt. Ltd*** [95] the plaintiff was aggrieved by the registration of the domain name www.casioindia.com by the defendant with its registration office in Mumbai. It filed a suit for trademark infringement in the Delhi High Court under the

[94] AIR 2003 SC 1177
[95] 2003 (27) PTC 265 (Del)

ISSN (Online): 2395- 6593

relevant provisions of trademark Act, 1999 along with an interim injunction application under Order 39 Rule 1 &2 of CPC 1908. On the issue of territorial jurisdiction, the defendant contended that it carried on business in Mumbai only and no cause of action arose in Delhi. The plaintiff, however, averred that the website could be accessed from Delhi also. The court held that "once access to the impugned domain name website could be has from anywhere else, the jurisdiction in such matter cannot be confined to the territorial limits of the residence of the defendant". Hence, the fact that website of the defendant can be access from Delhi is sufficient to invoke the territorial jurisdiction of this Court.

The different approach was adopted in ***Independent India TV V Indian Broadcast Live and others*** [96], Delhi High Court held that the court can exercise jurisdiction over the matter at where there is a high level of interaction between the forum state and the website; and evidence indicates that the website targets internet user in the forum in question. Thus a mere accessibility of website may not be sufficient to attract jurisdiction of the forum court.

In **National Association of Software and Service Companies vs. Ajay Sood & Others**[97], decided by Delhi High Court in 2005, the defendants were operating a placement agency involved in `head-hunting' and recruitment. In order to obtain personal data which they could use for head-hunting, the defendants composed and sent emails to third parties in NASSCOM's name. Court granted Injunction and Rs. 16 lakhs as damages.

Delhi High Court in **SMC Pneumatics (India) Private Limited v. Jogesh Kwatra**[98] granted an injunction and restrained the employee from sending, publishing and transmitting emails which are defamatory orderogatory to the plaintiffs.

In **Syed Asifuddin & Ors V. State of Andhra Pradesh & another**[99]**,** employees of a completing mobile services company lured the customers of the above company to alter / tamper with the special (locking) computer program / technology so that the hand-set can be used with the competing mobile services. Held: such tampering is an offence u/s 65 of IT Act as well as Copyright infringement u/s 63 of Copyrights Act.

[96] 2007 (35) PTC 177(Del).
[97] 119 (2005) DLT 596, 2005 (30) PTC 437 Del
[98] Being Suit No. 1279/2001 available at http://cyberlaws.net/cyberindia/defamation.htm
[99] 2005 CrLJ4314 (AP)

ISSN (Online): 2395- 6593

In ***Banyan Tree Holding (P) Limited V.A Murali Krishna Reddy & others***[100] , in this case plaintiff is a publicly listed company having its registered office at Singapore, and is a part of a group that is extensively involved in the hospitability business, managing about 81 hotels, resorts and spas in various parts of world. The plaintiff and its sister concerns have since1994 adopted and used the word Banyan Tree and also the banyan tree device, both of which were also used by its predecessor in interest. Plaintiff are extensive and continuous use the mark in relation to its business, they have acquired secondary meaning. The plaintiff also has initiated work on a project under the name Banyan Tree Retreat in Hyderabad. The word mark and device adopted by the defendants in relation to its retreat is deceptively similar to that of the plaintiff. The defendants have advertised their project in their website www.makproject.com/banyantree. Plaintiff has alleged that such use meant to unlawfully appropriate the reputation and good will of their business. The plaintiff alleged that since the defendants belong to the same trade/industry, such adoption of the plaintiffs mark is dishonest and is motivated to create deception among the public. Therefore, the plaintiff seeks an ex-parte interim injunction restraining the defendants from using its mark. The plaintiff claims that court has territorial jurisdiction to entertain the suit under Section 20 of the Code of Civil Procedure, 1908 since the defendants solicit business through use of the impugned mark Banyan Tree Retreat and the Banyan Device in Delhi. The court is of the view that the essential principle developed as part of the common law can be adopted without difficulty by our court in determining whether the forum court has jurisdiction whether the forum court has jurisdiction where the alleged breach is related to an activity on the internet. This court does not subscribe to the view that the mere accessibility of the defendant's website in Delhi would enable this court to exercise jurisdiction. A passive website, with no intention to specifically target audience outside the State where the host of the website is located, cannot vest the forum court with jurisdiction.

Therefore, the test is with respect to the defendant's use of a website that results in injury to the plaintiff in the forum state, and not a test for the plaintiff's claim of jurisdiction based upon the "carrying on business" clause. This decision is founded upon the premise that a part of cause of action arises at the place where the defendant sells its offending merchandise/service. Even there, the court imposed a rider that the website of the defendant must be an interactive one, specifically targeting the consumers in the forum state, because mere hosting of a website which can be accessed by anyone from any jurisdiction is not sufficient for the purpose of jurisdiction.

[100] CS (OS) 894/2008 (High Court of Delhi, 23rd November 2009) (India)

ISSN (Online): 2395- 6593

5. Conclusion: From the above discussion it is concluded that the mere fact that a website is accessible in a particular place may not be sufficient for courts of that place to exercise personal jurisdiction over the owners of website. However, where the website is not merely passive but is interactive permitting the browsers to not only access the contents thereof but also subscribe to the services provided by the owners, the position would be different. Where a website is interactive, the level of interactive would be relevant and limited interactivity may also not be sufficient for a court to exercise jurisdiction.